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IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

Ex Parte THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination, the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL by his Guardian EBEN SMITH, Defendants in Error.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, The Mutual Life Insurance Company of New York, a corporation, respectfully shows to this Honorable Court, as follows:

I.

That your petitioner is a mutual life insurance corporation or society, chartered and created under and by vir-

tue of an act of the legislature of the state of New York of April 12th, 1842, entitled: "An Act to incorporate The Mutual Life Insurance Company of New York," and a citizen of said state, with its principal office in the state of New York.

That in the year 1876, the legislature of the state of New York enacted a general statute entitled: "An Act regulating the forfeiture of life insurance policies" (Laws 1876, Chap. 341), as follows:

"Section 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor. the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the

contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

And thereafter in the year 1877, the said legislature of the state of New York amended the same as follows:

"The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

That prior, at the time of, and subsequent to the 29th day of April, 1886, there was in force and effect in the territory of Washington, a statute as follows:

"Sec. 2478. All corporations now existing or hereafter formed under the laws of other states or territories of the United States for the conducting and transacting of marine, life and fire insurance, or any other business not inconsistent with the organic law of this territory, shall have full power and authority to sue and be sued, hold, purchase and acquire, sell and dispose of real and personal property, and generally to do and perform any and every act, and transact business within this territory, in the same manner and to the same extent as though such corporation had been organized under the laws of this territory."
(Code of Washington, 1881):

and that said statute has remained in force from and since the admission of the state of Washington.

That prior to, upon, and subsequent to said date, your petitioner was transacting its said life insurance business in the territory of Washington, in full compliance with the statutes of said territory relating to foreign corporations transacting business therein, having its principal office for the transaction of said business in said territory, at Seattle.

II.

Your petitioner states that prior to the 29th day of April, 1886, and until his death on December 4th, 1890, one George Dana Hill resided at said city of Seattle and was a citizen of the then territory and since November 11, 1889, state of Washington. That shortly before the 29th day of April, 1886, the said George Dana Hill at said Seattle, made the usual application in writing for a policy of life insurance upon his life to your petitioner, in the sum of twenty thousand dollars. That said application contained the statement that the residence and postoffice address of said George Dana Hill was the city of Seattle, and that he had no purpose of changing the same. It further stated that he was a married man and the name of the person to whom the insurance should be payable in case of his death should be his wife, Ellen Kellogg Hill, but in event she should not be living at the time of its maturity, to the children of their marriage. The said application contained a statement that it was made to The Mutual Life Insurance Company of New York, subject to the charter of said company and the laws of said state, and after enumerating the usual statements and answers com-

mon in such applications, closed with the following paragraph:

"It is hereby declared and warranted that all the statements and answers as above made are complete and true, and that they, together with this declaration and agreement, constitute an application to The Mutual Life Insurance Company of New York for a policy of insurance, and are offered as a consideration for the policy hereby applied for. And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements, and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York. It is agreed that in any distribution of surplus, the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under said policy. It is also agreed that prompt notice of the death of the insured shall be given to the company, and formal proofs thereof, in accordance with the rules of the company, shall be furnished within one year after the said death.

Dated at Seattle, Tery. of Wash., the twenty-eighth day of April, 1886."

That after signing such application said George Dana Hill, at Seattle, delivered it to the agent of your petitioner at said Seattle, and after the medical examination of said George Dana Hill at Seattle, the agent of your petitioner at Seattle, transmitted the said application by mail to

Andrew B. Forbes at San Francisco, California, he being the general agent of your petitioner in the state of California, where the principal office of your petitioner on the Pacific Coast was situated. The said Forbes caused said application to be mailed to your petitioner at New York City. That your petitioner upon said application, executed its policy of life insurance to said George Dana Hill in New York City, bearing date April 29th, 1886, and caused the same to be forwarded by mail to said Andrew B. Forbes, its general agent at San Francisco, who re-mailed the same to the local agent of your petitioner at Seattle in the territory of Washington, and that said George Dana Hill, at said Seattle, shortly after that date, paid the first premium of eight hundred and fourteen dollars to your petitioner, and at the same time your petitioner, through its local agent at Seattle, delivered said policy of life insurance to said George Dana Hill. The following, excepting the provisions of the contract, not in any wise affecting this case, is substantially a copy of said policy of insurance:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Wife's Life,
Age 46 Years.
Annual
Premium,
$814.

Five Year Distribution Policy,
Amount, $20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the

county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use, twenty thousand dollars; upon acceptance of satisfactory proofs at its said office, of the death of said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made part thereof;

The annual premium of eight hundred and fourteen dollars and ..... cents shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY,
President.

W. J. EASTON,
Secretary."

Among the provisions and conditions on the back of the policy was the following:

"PROVISIONS, REQUIREMENTS AND BENEFITS.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and

accepted by the delivery and acceptance of this policy, and any further notice, required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by non payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided."

That shortly before the 29th day of April, 1886, when the second annual premium on said policy became due, your petitioner placed the renewal receipt therefor in the custody of its local agent at Seattle, and authorized him to deliver the same to the insured upon payment of such premium. That said George Dana Hill was at that time residing and continued to reside and have his place of business and his post office address at said city of Seattle. That on the said 29th day of April, 1887, the said agent personally informed the said George Dana Hill of such fact, and requested payment of the said premium, offering said renewal receipt in exchange therefor; that said Hill expressed himself to said agent as being unable to make the payment, and after repeated efforts to collect the premium, said agent returned the renewal receipt to the San Francisco office. The general agent at San Francisco again transmitted the receipt in order to afford further opportunity to said Hill to make payment, but upon such receipt being by the local agent at Seattle again presented to Hill with request for payment, he failed to make such payment, whereupon the receipt was returned through the San Francisco office to the home office of the company at New York City, and the policy entered upon the books of the company as lapsed, terminated and for-

feited, and thus the matter remained during the life of said George Dana Hill.

III.

Your petitioner shows that said Ellen Kellogg Hill, wife of said George Dana Hill, died at Seattle, Washington, February 14th, 1887; that said George Dana Hill, the insured, died at said Seattle on December 4th, 1890, leaving Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, children of the bodies of said Ellen Kellogg Hill and George Dana Hill, all of whom at the time of the death of said George Dana Hill were minors, and all of whom from their birth until his death, resided in the home of said George Dana Hill at Seattle, Washington, as members of his family, and under his parental care and guardianship.

IV.

Your petitioner further states that on the 19th day of October, 1895, George E. Hill and such of the others of said defendants in error as were of age, and those who were minors by their guardian, Eben Smith, brought suit against your petitioner to recover the amount of said policy, with interest, in the United States Circuit Court for the District of Washington, Northern Division, being No. 511, and in their amended complaint set forth the said policy and alleged compliance with its terms and conditions on the part of the said George Dana Hill during his life time, and subsequently by the said defendants in error. Your petitioner in said action admitted in its answer to said amended complaint, the execution and delivery of said policy, but denied compliance with its provisions by said George Dana Hill in his life time, or any

one on his behalf, and also denied compliance with any of the provisions of said policy on the part of the said defendants in error. Your petitioner further denied that said policy had been delivered or became a contract in the state of New York or elsewhere than in the state of Washington, where it was delivered and the first premium paid. Your petitioner averred in its answer that said George Dana Hill had failed, neglected and refused to pay the premium, or any part of it, falling due April 29th, 1887, and that no premium except the first annual premium had been paid on said policy from the time of its delivery to the time of the death of said George Dana Hill, December 4th, 1890, and that no tender or offer of payment of any premium had been made prior to or during the pendency of said action, by the said defendants in error or any one on their behalf. Your petitioner also affirmatively pleaded that there became due your petitioner as a premium on said policy, April 29th, 1887, the sum of eight hundred and fourteen dollars, and that said George Dana Hill and said Ellen Kellogg Hill, his wife, and each of the plaintiffs, failed, neglected and refused to make payment of the same, or any part thereof, and that ever since, and by reason of such neglect, refusal and default, the policy of insurance lapsed, terminated and became of no effect. Your said petitioner also affirmatively pleaded that it was a mutual life association, chartered under the laws of the state of New York, whose membership consisted of its persistent premium paying policy-holders. That at the time of the delivery of said policy and subsequent thereto, it had large numbers of outstanding policies, and its membership consisted of many thousands of persons whose lives were insured by defendant in various sums,

and that during all times your petitioner was dependent upon the proceeds of the funds arising from the payment of the premiums of its policy-holders, to meet its death losses, and in order to meet its liabilities and discharge its duties to its members, it was necessary that every member of the association make payment of his or her premiums, and also to make such payment as the same respectively became due; that but a single annual premium had been paid upon said policy. That defendants in error had not at any time paid or offered to pay any part of the premiums upon the policy of said George Dana Hill for the years 1887, 1888, 1889 and 1890, and that by reason thereof defendants in error were estopped from claiming the said policy to be an existing contract, or from claiming any right of recovery thereon by reason of the death of said George Dana Hill.

Your petitioner further in said action pleaded that at a time more than one year from the date of the issuance of said policy and more than one year from the 29th day of April, 1886, and during the life time of said George Dana Hill, it was mutually agreed between your petitioner and the said George Dana Hill that the said contract of insurance should be, and it was, waived, abandoned and rescinded, and that said George Dana Hill and your petitioner, by mutual consent, abandoned and rescinded said policy of insurance and all obligations thereunder. Your petitioner also affirmatively pleaded in said action that on the 29th day of April, 1887, in writing, and also personally, through its local agent at Seattle, it notified and informed the said George Dana Hill that the premium of eight hundred and fourteen dollars was due, and demanded payment, at the same time making tender to said

George Dana Hill of the usual renewal receipt of your petitioner upon such payment, and said George Dana Hill, being so advised and requested to make payment, failed, neglected and refused to do so, and at the time of presenting said receipt and demanding payment, said Hill informed your petitioner he was unable to make such payment and did not intend to pay the same, or the premiums thereafter to accrue upon said policy; that your petitioner then and there and ever since relied upon said conduct and representations of said George Dana Hill, and was thereby induced to, and did, declare the policy terminated and abandoned, and relying upon such conduct and representations upon the part of said George Dana Hill, your petitioner was induced to, and did thereafter refrain and abstain from giving or mailing, or attempting to give or mail, any further notice or demand whatsoever upon said Hill, for the payment of any premium upon said policy, and for such reason abstained from giving any notice to said George Dana Hill on account thereof.

Your petitioner also pleaded as a defense in said action, the character and purpose of its corporate being as aforesaid, its membership and its dependence upon the proceeds of premiums upon its policies for funds with which to pay its death losses, and meet its financial liabilities; and that agreeably to the requirements of its charter and its rules and regulations, on the 31st day of December, in every year, it heretofore has and does ascertain the amount of its liabilities, and that such liabilities depend upon the policies in force, issued by your petitioner. That your petitioner makes such ascertainment of liabilities and makes statement thereof, to its policy-holders, for their information, benefit and protection, and to the public at

large from whom it seeks insurance, and that such had during all said times, been its practice. That after said George Dana Hill had failed to pay the annual premium falling due April 29th, 1887, your petitioner had caused the said policy to be entered upon its records as lapsed, and terminated, and did not include the same as a liability in said ascertainment and statement to its policy-holders, and never since said time had included or reported the said policy as among its liabilities. That the premium-paying policy-holders of your petitioner have at all times acted upon the faith of the said statements of liabilities, and persons becoming members of your petitioner taking out policies since the said 29th day of April, 1887, have also been induced to and have relied upon the correctness of your petitioner's statement of liabilities, and have been induced to believe and have believed that the said Hill policy became lapsed and terminated April 29th, 1887, and did not since said time constitute a liability of your petitioner. That the said George Dana Hill as a member of your petitioner was advised of the said facts. That the larger part of the single premium of eight hundred and fourteen dollars paid upon the said policy was absorbed and expended in payment of fees and commissions to agents, examiners and other expenses pertaining to the obtaining and issuing of said policy. That there never was in fact or in equity any thing or fund by way of surplus, accretion or otherwise, due or owing upon the said policy issued to said George Dana Hill, and that the said policy had not contributed in any manner to the reserve fund of your petitioner, out of which death losses were paid, and that for said reason the demand of defendants in error tended to the disorganization of your peti-

tioner's business, was and is inequitable to all of its policy-holders, and that said defendants in error never having paid or offered to pay any of said defaulted premiums, should be estopped from recovery in this action.

Your petitioner states that said cause No. 511 came on for trial to a jury in the Circuit Court of the United States for the District of Washington, Northern Division, on the 4th day of September, 1901, and upon said trial it was shown by uncontradicted evidence that the first annual premium was paid, and the said policy of insurance was delivered to said George Dana Hill at the city of Seattle, in the State of Washington. It was also admitted that no other premium had ever been paid or offered to be paid during the life time of said Hill; that his death occurred December 4th, 1890; that from the date of the application for said policy until the time of his death, the residence, place of business and post office address of said George Dana Hill was at Seattle, Washington, and that he had no post office address in the State of New York. It was also shown by uncontradicted evidence that at the time the second annual premium on said policy became due as alleged in the answer, the usual renewal receipt of the company, signed by its president or secretary, was placed in the hands of the local agent of the company at Seattle, who presented it personally to the insured, George Dana Hill, and advised him of the due date and amount of the premium, and called upon him for payment, and that repeated requests for the premium were made, extending over a period of a month or more, but that through lack of ability, or disinclination, the said insured failed and refused to make payment, and that after such ineffectual attempts to collect the premium, the renewal receipt was

returned to the home office and the policy entered as lapsed, forfeited and terminated upon the books of the company. It was also shown that the insured, Hill, was an educated man, having served a number of successive terms as treasurer of the county in which the city of Seattle is situated. It was admitted the wife had died prior to the death of the insured, and that the plaintiffs below were, up to the date of his death, minors of tender age, residing with the said George Dana Hill at his home in Seattle, and under his parental care and authority. Upon this undisputed testimony and the pleadings in the case, your petitioner, upon the close of the testimony, moved the Court to instruct a verdict in its favor, which motion was denied, and the said cause was submitted to the jury, with the following instructions:

"The Court—Gentlemen of the Jury: This is an action brought by the plaintiffs, who are the children and heirs of George Dana Hill, to recover the amount of insurance upon the life of George Dana Hill, written by the defendant company in the policy described in their complaint.

"It is conceded that the defendant's company issued the policy and received payment of the first annual premium. The issuing and delivering of the policy and the receipt of the premium put the contract in force so that it became a binding obligation upon the defendant company. By the terms of the policy the company insured the life of George Dana Hill for the period of one year, for the amount of money which it received, and it also insured his life and became liable to pay to his wife, if living, or otherwise to his children, if she did not survive him, the amount of the insurance at the time of his death, upon the condition that the annual premiums should be kept paid. There was as much obligation on the part of

the beneficiaries in this policy to pay the insurance company the annual premiums provided for, as there was upon the part of the defendant company to pay the insurance at Captain Hill's death.

"It is also a conceded fact in the case that no other premium was ever paid to the company except the first one, and that there was a default made in the payment of premiums, which accrued on the 29th day of April, 1887, and on the same date in 1888, and the same date in 1889, and the same date in 1890.

"Ordinarily, where parties are free to make their own contracts according to the disposition of their own minds, a contract, conditional, as this one is, would be terminated as to the rights of the defaulting party and as to the obligation of the adverse party, by a breach of the conditions of the contract as there has been in this case, but there is a question in this case as to whether the rights of these plaintiffs are not saved by a provision in the statutes of New York which was in force during the time intervening between the issuance of the policy and the death of Captain Hill, which denied to the insurance company the right to claim a forfeiture for non-payment of premiums or to claim that the policy had lapsed because of the non-payment of premiums, unless the company proceeded in a manner provided specially by the statute for giving notice containing specific declarations provided in the statute, which notice had to be sent to the person whose life was insured, by mail, at least thirty days before a forfeiture could be claimed. Now, that question, whether the rights of the parties are saved or not by this statute is a question which the Court reserves for future consideration. It is a fact that one of the contracting parties resided in the State of Washington and that the home office of this defendant company is in New York, and that the transactions between them by which a contract was finally consummated, was partly in the State of Washing-

ton and partly in the State of New York, and because of the transactions being thus partly in one State and partly in another, there is a question in the case whether the law of New York, by reason of its own force, did have any controlling effect in the case; and the parties have, in the contract itself, made certain stipulations which leave a question which has not yet been passed upon by the Supreme Court of the United States in this case, or any other case, and that question as to the effectof the stipulation of the parties in this contract, is one which the Court reserves for future consideration.

"Now, the Court assumes, in submitting the case to you, that the rights of the plaintiffs are saved by the New York statute, unless the contract has been abrogated by the conduct of the plaintiffs since the policy was issued.

"One of the defenses set up in the defendant's answer is, that these plaintiffs neglected and refused to pay the premiums. A refusal on their part would constitute a complete bar of their right to recover in this case. If they have refused to pay the premium then that amounts to a complete abrogation of the contract itself.

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premium has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid, refused to pay them, and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case, as would amount to a refusal to pay the premiums or whether there was any express contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract.

"There is another question which I submit to the jury, and that is whether Captain Hill himself, whose life

was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or trustee of the plaintiffs, and his act would not be an equivalent to their act, but the contract was made by him; and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect.

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father that was approved and ratified by them, which abrogated this contract in any way, your verdict will be for the defendant. If there was no such subsequent abrogation of the contract your verdict will be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of $29,020.

"I submit to you two forms of verdict. Whichever conforms to your decision in the case will be signed by your foreman and brought into court as your verdict in the case."

Thereupon the jury rendered a verdict against your petitioner in the sum of twenty-nine thousand and twenty dollars.

Your petitioner further states that it requested certain instructions to be given to the jury which it believes were erroneously refused; that in due time and manner your petitioner moved the said trial court to set aside said verdict and for a new trial, which motion your petitioner believes was erroneously denied; and your petitioner further in the reservation of its rights, moved that notwithstanding said verdict, judgment should be rendered in favor of your petitioner, which motion was also by the said trial court denied, to which second ruling your peti-

tioner duly excepted and its exception was allowed by the court, and thereafter and on the 30th day of January, 1902, the following judgment was rendered upon said verdict:

"IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE HILL by his guardian, EBEN SMITH, *Plaintiffs,* vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant.*	No. 511

JUDGMENT.

The above cause having heretofore come on for trial in the above court on the 4th day of September, 1901, and the jury having been regularly empaneled, and the Court having heard the proofs and the allegations of the parties and Stanton Warburton, Harold Preston and Eben Smith having appeared for the plaintiffs, and Messrs. Struve, Allen, Hughes & McMicken, and R. C. Strudwick, having appeared for the defendant, and the case having been submitted to the jury upon the instructions of the Court and the allegations of the parties, and the jury having retired to consider the evidence under the instructions of the Court, and having returned a verdict in open court in favor of the plaintiffs and against the defendant on the 6th day of September, 1901, in the sum of $29,020, and the defendant having filed and served its motion for a new trial and the same having been argued and considered by the court and overruled, and exception to the ruling of

the Court duly allowed, and the motion of said defendant for judgment notwithstanding the said verdict having been argued by counsel of the respective parties, and having been duly considered, was overruled, and exception was duly allowed; now upon the application of the plaintiffs for judgment upon said verdict:

It is ordered, considered, and adjudged that the plaintiffs, Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene Hill, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of $29,020.00, together with the sum of $677.13 interest from the 6th day of September, 1901, together with their costs and disbursements in this action taxed at $....., said sum to draw interest from this date at the rate of six per cent per annum. To the rendering of the foregoing judgment said defendant excepts and its exception is allowed.

January 30, 1902.

C. H. HANFORD, Judge."

(Endorsed): Judgment. Filed in the United States Circuit Court, District of Washington, January 30, 1902. A. Reeves Ayres, Clerk.

H. M. Walthew, Deputy."

V.

Your petitioner, feeling itself aggrieved by the said judgment, within six months after its rendition, sued out a writ of error in the Circuit Court of Appeals for the Ninth Circuit for the State of Washington, of the manifest errors that happened to the damage of your petitioner as shown by the records and proceedings as well as the judgment, and the returned writ of error having been made to the said Circuit Court of Appeals, and each and all of said errors were by proper assignments of error duly presented

for the determination of said appellate court and the cause came on for hearing before said Court and on the 6th day of October, 1902, the said Circuit Court of Appeals rendered and filed its opinion in writing affirming the judgment of the said Circuit Court.

VI.

Your petitioner further states that conformably to the rules of said Circuit Court of Appeals, your petitioner duly filed and presented to said Circuit Court of Appeals its petition for rehearing of the said cause in said Court, which petition was by said Circuit Court of Appeals on the 10th day of November, 1902, denied, and pursuant to the said written opinion said Circuit Court of Appeals has made and entered its judgment affirming the judgment of the said Circuit Court.

VII.

Your petitioner states that on the face of the record of said cause as the same is on file and was presented in said Circuit Court of Appeals with the assignment of errors made and presented by your petitioner in the said Circuit Court of Appeals, substantially the same issues and questions are presented in this case as were presented in the case of

Mutual Life Insurance Co. v. Phinney (178 U. S. 327).

Mutual Life Insurance Co. v. Sears (178 U. S. 345).

Mutual Life Insurance Co. v. Hill (178 U. S. 347).

Mutual Life Insurance Co. v. Allen (178 U. S. 351).

Mutual Life Insurance Co. v. Cohen (179 U. S. 362).

and that in the judgment of counsel of your petitioner, the rules and views as expressed in said opinions, if adopt-

ed and followed by the said Circuit Court of Appeals in determination of your petitioner's said cause, would have resulted in the reversal of the same by said Circuit Court of Appeals, but that on the contrary, in the judgment of counsel of your petitioner, the spirit and meaning in effect of the said opinions of this Court were not correctly apprehended by said Circuit Court of Appeals, and the same were erroneously interpreted, and were either not applied, or were erroneously applied to the facts in your petitioner's case in the said Circuit Court of Appeals, so that in the opinion of counsel of your petitioner, your petitioner was deprived of the benefit of the rules and views expressed in said opinions of this Court, to your petitioner's great prejudice.

The following questions and propositions were and are in issue in the adjudication of said cause:

First: Whether the statutes of New York, of 1876, as amended in 1877, relating to Insurance Companies transacting business in the State of New York, apply to the policy of insurance in this case, which was delivered and first came into being in the territory of Washington, where at the time of delivery the first premium was paid.

Second: Whether, if the said policy having been delivered and becoming binding in the territory now State of Washington as a contract was in its performance to controlled by the statutes of the State of New York.

Third: Whether, the first premium having been paid, and the policy having been delivered in the State of Washington, and the insured having at that time and until his death, his residence and post office address in the State of Washington, and having no post office address in the State

of New York, the statutes of New York could have any application to the contract of insurance.

Fourth: Whether the following provision in the application for insurance,

"And it is agreed there shall be no contract of insurance until the policy shall have been issued and delivered by said Company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York,"

when considered along with other parts of the application and policy, and especially the following printed upon said application, "SPECIAL NOTICE TO APPLICANTS AND POLICY HOLDERS. * * *

"Policy holders must not expect to be notified when their premiums will be due. It is a practice of the Company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the Company in consequence of their non-reception,"

and the following provision in the policy,

"Each premium is due and payable at the home office of the Company in the city of New York; but will be accepted elsewhere when duly made in exchange for the Company's receipt signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived."

subjects your petitioner to compliance with the statute of New York relative to mailing premium notices, notwithstanding the fact that said policy was delivered when the first annual premium was paid in the territory of Washington, and notwithstanding the fact that the post office address of said insured was at all times during his life in the State of Washington, and that during all such times he had no post office address in the State of New York.

Fifth: Whether your petitioner, being a Mutual Life Association, whose membership is composed of its premium paying policy holders, can be compelled to pay the death loss, although but a single annual premium had been paid on the policy upon its delivery in the territory of Washington, April 29, 1886, and no payment or offer of payment of the premiums falling due in April, 1887, 1888, 1889 and 1890 was made by or on behalf of the insured in his life time, or offered to be made by or on behalf of any of his beneficiaries before the commencement of or during the pendency of the action.

Sixth: Whether upon the facts stated in the last proposition, the action is not in the nature of specific performance, and whether plaintiffs bringing this suit are not estopped by reason of failure of performance of the contract upon their part and that of the insured from seeking a recovery from the members of the Association who have by the payment of premiums created a fund out of which plaintiffs in the trial court are seeking contribution in the payment of the death loss provided for in this policy.

Seventh: Whether, by reason of the admission that before a single annual premium had been paid upon the

policy, and the undisputed testimony that at the time the second annual premium fell due, the local agent of the Company, having repeatedly presented the renewal receipt to the insured, George Dana Hill, Seattle, Washington, and requested payment, and the said Hill having been informed of the amount of the premium and offered in exchange for its payment such renewal receipt, but failing and declining to make payment of the same, had not abandoned and terminated the policy; and further, whether the Company was not thereby warranted to treat the policy as terminated, and so enter it as it did upon its books, and whether if the policy was by the mutual action of the insured and the Company, terminated and abandoned, the beneficiaries are not bound by such arrangement.

Eighth: Whether the refusal of the insured, George Dana Hill, to make payment of the second annual premium, as is shown by the undisputed testimony, and continuing in such refusal until his death in December, 1894, is not the refusal of the beneficiaries.

Ninth: Whether the Insurance Company was required to make demand of payment from the beneficiaries, who from the date of the insurance until the death of George Dana Hill, were his infant children of tender age, left in his home at Seattle, under his parental care and keeping.

Tenth: Whether, for the purposes connected with the payment of premiums, the insured, George Dana Hill, was not the trustee or agent of the beneficiaries in all matters relating to the payment of premiums, and whether they were not bound by his acts and conduct in relation thereto.

Eleventh: Whether the laws of the state of New York enter into this contract of insurance or control in its performance or in the business of collecting premiums on the policy in the face of the specific stipulation of the parties in the policy that no notice other than the policy itself provides, shall be given, any statute to the contrary notwithstanding.

VIII.

Your petitioner further states that it has issued and now outstanding in the different territories and states of the Union, and elsewhere, many thousands of life insurance policies, has entered into such contracts with large numbers of the residents and citizens of the State of Washington, and throughout the Ninth Judicial Circuit, and other life insurance corporations created and organized under the laws of the State of New York, have entered into and now have outstanding large numbers of similar policies in said states and territories; that in view of the large amount of money involved in this litigation, and in view of the difference of judicial opinions respecting a number of the questions involved in this case, as your petitioner is informed and believes, between this honorable Court and the Circuit Court of Appeals for the Ninth Judicial Circuit, and the Circuit Courts in said judicial circuit, your petitioner represents that the gravity of the matters involved in this case is such that they should be authoritatively and finally adjudicated by this honorable Court upon a full and fair presentation of the merits of the said case (or such of them as the Court may direct) on the part of your petitioner, and the said defendants in error,

Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, by his Guardian ad litem, Eben Smith.

X.

Your petitoner states that a certified copy of the entire record in this case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application in conformity to Rule 37 of this honorable Court, relating to cases from the Circuit Courts of Appeals, and the same is marked "Exhibit A."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the said Circuit Court of Appeals in said cause therein entitled "The Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, by his Guardian ad Litem, Eben Smith, Defendants in Error, No. 813, to the end that the said cause may be reviewed and determined by this court as provided by Section six of an act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and

in conformity to said act, and that the said judgment of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.,

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
E. S. PILLSBURY,
W. H. CHICKERING,
Attorneys and Counsel for Petitioner.

DISTRICT OF WASHINGTON,
Northern Division,
County of King.

JOHN B. ALLEN, being duly sworn, says: That he is one of the attorneys and of counsel for The Mutual Life Insurance Company of New York, petitioner above named, and as such has had personal charge for it of the case in the foregoing petition mentioned in the Circuit Court of Appeals for the Ninth Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

JOHN B. ALLEN.

Subscribed and sworn to before me this fifth day of December, A. D. 1902.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the District of Washington, Northern Division.

By R. M. HOPKINS,
Deputy Clerk.

[Seal.]